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2010

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Repository Citation

D'Amato, Anthony, "International Human Rights at the Close of the Twentieth Century" (2010). *Faculty Working Papers*. Paper 72.
<http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/72>

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International Human Rights at the Close of the Twentieth Century,
by Anthony D'Amato*, 22 International Lawyer, 167-177 (1988)

Abstract: Speculates as to why the human-rights revolution is increasingly likely to dominate our foreign-policy attentions in the decades to come. Ventures some predictions, of particular interest perhaps to international lawyers, about where the cause of international human rights is heading.

Tags: international human rights, international law, foreign policy

[pg167]**We are in the midst of the human rights revolution, perhaps the most important development in the cultural history of homo sapiens. In the United States since 1945 equal rights for blacks, via the civil rights movement, and equal rights for women, via the movement toward the Equal Rights Amendment, have fundamentally altered our perceptions and our laws. Internationally, the Nuremberg trials following World War II removed the shield that officials thought they had when they adopted and implemented genocidal policies directed against religious or ethnic minorities. The cause of human rights has since moved to issues that are perhaps less dramatic, but nevertheless may be broader in scope.

In this essay I would like to speculate as to why the human-rights revolution is increasingly likely to dominate our foreign-policy attentions in the decades to come. Then I want to venture some predictions, of particular interest perhaps to international lawyers, about where I think the cause of international human rights is heading. My purpose is simply to help increase awareness and sensitivity about these matters. Of course, prediction is anybody's guess, and as Richard Falk remarked at a recent panel of the American Society of International Law, the hardest thing of all to predict is the future.

I. Human Rights and Realpolitik

While militarily weak states have a stake in peacefulness secured by international law, militarily powerful states have a different motivation for accepting the rule of law throughout the world. Militarily powerful states are not themselves vulnerable to attack, but their citizens who travel outside their borders are vulnerable. Yet travel abroad is a necessity: a [pg168] state first of all must send ambassadors abroad; it also sends other diplomatic and consular personnel; its political leaders on occasion travel abroad; it may have soldiers stationed on bases in other countries; its performing artists may be visiting other countries; its students may be studying in foreign universities; its news reporters may be investigating news events or sports events abroad; many of its citizens may be touring abroad; and last but not least, it will have vast commercial dealings abroad as its businesspersons engage in trade on the world market and investment in other countries, and as multinational corporations proliferate. All these people are vulnerable. Even if their home country has a huge stockpile of nuclear weapons, those weapons will be next to useless in the face of illegal incarceration in a foreign prison or kidnapping by a terrorist organization. As the United States learned as a result of the outrageous taking of diplomatic hostages in Tehran in 1979 and the kidnappings of ordinary citizens in Lebanon in the mid-1980s, vast military power and nuclear superiority count for very little in terms of getting those citizens back home safely.

Militarily powerful states are increasingly recognizing the vulnerability represented by their citizens who venture across their boundaries. This recognition comes largely as the result of the single most powerful force of the twentieth century: the power of the media, especially television, to

create instant empathy for individuals who are in trouble in foreign lands. An American in trouble abroad is not merely an isolated adventurer off on a personal frolic; rather, the individual is a part of this country just as Rhode Island is a part of this country. This perception that a country is not confined to its own territory but rather travels abroad when its citizens travel abroad is heightened by the recognition of the importance of businesspersons engaging in trade abroad to help the consumer at home in an increasingly interdependent world economy. The cultural values of tourism also feed into a nation's perception of its own worth. Nations increasingly are perceiving individuals who engage in entrepreneurial activities abroad as persons whose activities have a national-interest component as well as the more obvious personal-profit motive.

As a result, the creation of a world where basic human rights are respected is increasingly important to militarily powerful states. The rhetoric in the United States associated with Henry Kissinger and the "national security" hardliners is beginning to sound stale. The United States is not militarily vulnerable to a hostile takeover by any other nation; we do not need military help from others in the form of collective security pacts as far as our own national security is concerned. Nevertheless, our citizens traveling abroad desperately need the protection of the international law of human rights.

[pg169]Even as the human-rights issue becomes increasingly real to Americans, signs of a thaw are emerging in the Soviet Union, where the "national security" hardliners predominate to a far greater extent than in the United States. The initiatives known as *glasnost* represent a perception, almost at the eleventh hour, that the cause of international human rights is consistent with, and not inimical to, the fundamental interests of the Soviet state. Naturally the hardliners there, as here, resist these trends. It is not simply a cliché that generals are trained to fight the last war. Military leaders in both the United States and the Soviet Union have a World War II complex that probably will not pass until all those persons who experienced that war are gone from the scene. The Soviet Union still plans for, and fears, an armored invasion eastward from Europe. The anachronism is as striking as the Kissinger-type strategists in the United States talking about the international balance of power as if we still lived in the time of Metternich, discussing nuclear weapons that can be used "tactically," and plotting nuclear exchanges that can be "contained."

The biggest defect in the hardliner view of the world is the failure to recognize that even on the assumption that this is a bipolar world with the two superpowers locked in a military staredown for immense stakes, the reason for the increasing success of American influence in the world since the 1950s is not that we have a few more nuclear submarines than they, or a few more bases, or that their ICBMs have forced us to draw together NATO and SEATO powers in tight collective security alliances. Rather, what has occurred is the inherent and natural power of the free market system to spread by itself. Private property has won over collective property, a lesson Stalin refused to learn when he butchered ten million Russian farmers who did not quite fit into his notion of agrarian reform. So long as the Soviet Union competed against us in third-world markets by the use of state-owned enterprises that were soon perceived as the advance guard of potential military domination, we were able to out-compete for those markets and allegiances even though the technology proffered by the Soviets was artificially subsidized. In short, our commercial initiatives since World War II have gained ground against communist-sponsored offerings even though the communist nations could offer a more attractive price. Uncommitted and third-world nations have perceived that the lower price was too high if it meant vulnerability to Soviet influence and control. Of course, the new *glasnost* initiatives are a sign that the USSR has finally realized the futility of their previous

approaches. If this means more effective competition for the United States, we should welcome it; we have considerable expertise dealing in competitive markets.

Even as the Soviets are beginning to realize the need to move toward individual economic rights as a way of competing in the world markets, [pg170] the United States is beginning to realize the deep affinity between a free market and human rights. As recently as the Nixon and Ford administrations, international human rights were considered an annoyance in the foreign-policy realm. Support for the Shah of Iran was predicated on a Kissinger-type notion of collective military security that refused to acknowledge human-rights atrocities committed by the Shah or the rising discontent of the Iranian people living in a police state. The Carter administration was a transitional period. In perhaps his most historically memorable utterance, Jimmy Carter said that human rights is the "soul" of American foreign policy. Yet inconsistently he continued support for the Shah (including allowing the Iranian police to practice their brutal methods within the United States itself), a policy that led to the downfall of his administration. Under President Reagan, with inconsistencies here and there, human rights has increasingly occupied center stage in our dealings with other countries. The administration's present stance against Pinochet of Chile would hardly have been imaginable fifteen years ago, and the toppling of Marcos in the Philippines and Duvalier in Haiti are truly historic signs of nails in Metternich's coffin. (Of course, those in the administration who have been frustrated with these events found a ready channel for their activities in supporting the contras in Nicaragua. This was pure we-versus-them military adventurism, inimical to human rights. But given the current Irangate investigations and prosecutions, even this siphon for realpolitik energy bids to be clamped off.)

Elsewhere I have attempted to spell out the deep affinity between free markets and human rights. FN1 Suffice it to say here that a free world market relies upon individual units (persons, corporations) competing with each other to maximize products and services that other individual units desire. The profit motive that constitutes the engine driving the free market only works when the heavy hand of government and bureaucracy is absent, as Eastern bloc countries have learned to their dismay. A free market requires recognition of private worth; the individual units making up the market engage alternatively in production and consumption, activities that would be senseless were it not for a recognition that the purpose is the satisfaction of individual wants and not the fulfillment of some abstruse ideology. In contrast to free markets is pervasive regulation by government which, as Ayn Rand so convincingly demonstrated in her many works, can only be accomplished by legions of bureaucrats. Bureaucrats, as Rand demonstrated, do not produce; they merely consume. Hence the more bureaucrats per capita (which we loosely call "big government"), the more the non-bureaucrats are enslaved to feed, clothe, and house the [pg171] bureaucrats. To justify their existence, bureaucrats arrogate decisional authority to themselves and progressively reduce the sphere of freedom and human dignity of the nonbureaucrats. Thus the clash of free markets versus bureaucratic control parallels the clash of human rights versus dictatorship. FN2

The free enterprise system will not of itself ensure the fruition of all human rights. Irving Kristol's phrase, "Two cheers for capitalism!" is instructive. It has long been evident that free markets need the sort of limited regulation that enables them to remain free. Without antitrust laws, for example, business combinations can become so powerful as to extend their drive toward monopolization into the political realm, thus subverting the free market at its central nervous system. Fine-tuning the law to serve free enterprise by keeping it free, while avoiding excess regulation that leads to dependence on governmental, and hence bureaucratic, largesse, is a specialized job for those who

know and understand the law. Let us turn, then, to the fine-tuning necessary in the international arena as we look ahead to some of the major problems of the end of the millennium.

II. Human Rights Issue-Areas

Human rights problems are not the only, nor the major, problems facing our small green planet. We live under the constant threat of nuclear destruction. We are in danger of depleting the fragile ozone layer that miraculously shields us from the sun's deadly ultraviolet rays. We are destroying our tropical rain forests and thus may create an irreversible imbalance in the life-sustaining components of our atmosphere. AIDS and perhaps mutations of the AIDS virus are life threats to our species. These are extremely real, extremely serious, and unique threats to the human race (whose existence, so far, is measured in the thousands of years, compared to the dinosaurs who ruled the earth for a hundred million years and then were totally wiped out). To talk, then, about human rights seems to focus on a problem of less than vital import. Yet we have to operate on all fronts. And the human rights problems are serious enough.

A. PROBLEMS OF ASSOCIATIONAL EXCLUSIVITY

The major cause of strife and bloodshed in the past few centuries has been, to put it simply, the clash between the desire of some people to live and associate exclusively in a given territory with "their own kind," and [pg172] those who resist such associational exclusivities. The terms "prejudice" and "intolerance" can apply equally to both groups. Insiders can be said to be prejudiced against people not of their own kind, while outsiders can be said to be prejudiced against people who want exclusivity of association. Hence terms such as "prejudice," "intolerance," and "discrimination," although widely used in human-rights discourse, do not get us very far analytically.

Another term much used in this context is "self-determination," which is also more of a rhetorical than an analytical tool. Under the banner of self-determination, empires have been dismantled, former colonies have become states, and the number of independent nations in the world is higher than ever before. Despite such exercises of self-determination, however, minorities in many nations today cry for their political self-determination or some degree of autonomy. FN3 Yet, as Ivor Jennings stated the analytical question, "the people cannot decide until somebody decides who are the people." FN4 If there is a plebiscite, who decides who is to participate in it? Should the decision be made according to geographic area, or according to some authority that determines who the "indigenous" people are? Professor Pomerance, who has given careful thought to this problem, concludes that if self-determination means anything, it signifies a continuum of rights. One must maximize individual as well as group rights while respecting the rights of other individuals and collectivities: "Alternatives such as federal schemes, autonomous regimes, minority rights, guarantees of non-discrimination, and the right of option, may present themselves as reasonable and just solutions in some instances." FN5

Perhaps, analytically, no "self-determination" right as such exists because of the intractable problem of determining who is entitled to self-determination. Nevertheless, we still should listen to and evaluate claims for self-determination when minority individuals and groups claim that they have been discriminated against with regard to their human rights. The self-determination problem thus transmutes into the problem of securing respect for fundamental human rights and freedoms. We can have more sympathy for groups seeking self-determination if their complaint is that their basic human rights (other than claims of associational exclusivity) are not being respected. Then

we may perhaps put aside the self-determination matter and see whether, if respect for their human rights [pg173] is established, they might decide that associational exclusivity is not what they really wanted after all. The challenge for international scholars is to work their way out of the self-determination morass by seeing if focusing upon basic human rights and freedoms will either dissolve the problem or at least suggest the merits of alternative political solutions.

B. THE RIGHT TO SUBSISTENCE

Many international conventions contain provisions on the right to food, to shelter, and to clothing. FN6 I suggest we view them as a single right: the right to subsistence. Every human being born into this world has a powerful claim on the rest of us to that minimal share of resources that will barely sustain its life. Extremists on one side will say that that is not enough; justice requires that we share more of our resources with those who are extremely poor. FN7 Extremists on the other side will say that no government has the right to take away any of our property to distribute it to the poor, even if the poor as a consequence will starve to death. The debate will not progress if it polarizes at these extreme positions. Instead, the world needs to develop a minimalist theory advocating a right to bare subsistence, but only bare subsistence, even at the expense of invading the property of others through taxation. Customary international law is moving in this direction.

A right to subsistence is a right that only, and necessarily, attaches to people who need minimal subsistence in order to survive. It does not attach to the states where those people are located. Thus, if a rich nation *A* distributes food to a poor nation *B*, the government officials of *B* would be guilty of a criminal violation of international law (under the theory advocated here) if they then fail to distribute the food free of charge to their citizens. Hence, the subsistence theory has "bite" in that it applies to all states, including the home states of the people who need subsistence.

Many lawyers fear that the adoption of multilateral conventions proclaiming a right to subsistence would infringe upon the freedom of individuals to be charitable or not to be charitable as they see fit, and also make an unprincipled inroad into the right of private property. These are legitimate fears and can be briefly addressed.

[pg174]First, it is certainly true in one sense that coerced charity is not charity. However, suppose a group of people feel that a certain charity is important. Even if all the members of the group are urged to contribute, some will hold out on the assumption that the others will take care of the problem. To avoid the "free-riders," the group enacts legislation requiring everyone to contribute. It is hard for a potential free-rider to oppose that to which in principle he has agreed. Hence, the resulting law makes it possible to avoid free-riders by requiring a contribution from everyone. The same reasoning can be applied to address effectively the problem of people starving to death. Participation in multilateral conventions is a free choice that results in group charity, but for a noble end.

Second, the inroad into private property is in principle a fear that accompanies any taxation for social welfare. Taxation for social welfare is, at bottom, robbing Peter to pay Paul; its philosophic justification is that Peter agreed to it by participating in a democracy that was sensitive to Paul's basic needs. Its practical justification is more interesting. A tax that is in reality a transfer payment (that is, taking from Peter to pay Paul) only works if it is a minor tax. If the tax gets too large, Peter stops earning income, sits back, and joins Paul in wanting to be paid. Clearly, Peter needs a sufficient incentive to produce so that he chooses production over passive consumption. The difference cannot be small, however. For example, Peter can get a job that pays \$500 per week. If he is taxed

\$200, and the \$200 is paid over to Paul, Peter gets only \$300 for working compared to \$200 that he would get for not working. Peter will undoubtedly choose not to work. Then, with Peter having joined Paul in the ranks of the unemployed, Mary, who is working, has to pay a higher transfer tax. If Mary makes \$500 a week, she may have to pay \$250 in order to support all the Peters and Pauls who are not working. Mary then quits, because she nets only \$250 a week for working while she can get \$250 a week for not working. At this point, everyone stops working. No income is left to tax.

Hence, the transfer payments have to be slight enough to keep nearly all the workers in the labor pool and nearly all the entrepreneurs in business. If the transfer payments are going outside the country (as they would in the case of providing subsistence to starving people abroad), the tolerable amount has to be quite small in order for the transfer payment system to function at all. The transfer payments can be larger if the funds are kept within the country (as in Social Security, unemployment, and welfare taxation in the United States) because the money that is paid over to the recipients is soon spent and finds its way back into the economy, increasing the gross income of those who are working. FN8

[pg175]Another way to express this result, using morality instead of economics, is that a universal system of human rights must respect the right of a person to the fruits of his or her own labor equally with the right of another person not to starve to death. We are enslaved to the extent that the fruits of our labor are taken away from us. We can tolerate minimal enslavement to save children from starving, but moral imperatives would begin to lose their force if pressed much beyond that point. Since starvation is a Malthusian check upon runaway population growth, any moral imperative that we allow ourselves to be taxed to save children from starvation would have to accommodate our insistence upon non-Malthusian alternatives such as education in family planning and birth control to go along with the free food.

Nations are already moving, in fitful steps, toward such a solution. In my view, this movement is a sign of our increased cultural awareness. If children are starving to death in any part of the world, I have a moral obligation to do something about it. The role for lawyers is to make what I do much more effective than my sending a CARE package that might wind up being confiscated and sold by some government officials for their own benefit at the dock of the receiving country. I would not feel tremendously coerced if a small tax were levied upon me and upon everyone else, if I knew that the proceeds would really go, one hundred percent, to prevent actual starvation.

C. THE RIGHT OF CHILDREN TO FAMILY SUPPORT AND NURTURE

Going beyond bare subsistence, infants and children need family support and nurture. While there is no feasible nor desirable way to require adults to take care of needy infants, throughout the world many childless couples are eager to adopt and raise children. Unfortunately, at the same time, countless infants and children are starving to death. Many of these are orphaned or abandoned; others presently have parents who are also starving and who would be willing, for the children's sake, to give them up for adoption. An uncluttered view of human rights would seem to indicate that the requirement here is simply to match needy children with willing foster parents. It follows that governments should assist in the distribution of needy children in their own countries to willing foster parents in any foreign country.

[pg176]Governments are reluctant to do this. They do not want to admit that their own people are starving or that they cannot provide subsistence to their own citizens; they do not want to see

their future generations being shipped off to other countries. As a result they throw roadblocks into the transnational adoption process, or corrupt officials demand exorbitant bribes. Nor are the receiving governments more cooperative. They maintain immigration quotas which, whatever the justification (if any) such quotas might have for alien adults, are extraordinarily cruel when applied to infants from abroad who need adoption. In this area of human rights, then, what is needed is an articulation of the child's right to family support and nurture, an examination of its status under evolving customary international law, and a realization that the offenders here may be the traditional subjects and objects of international law: states themselves. Then we have to beg, cajole, or shame the governments into putting into place effective transnational adoption procedures.

D. CIVIL AND POLITICAL RIGHTS

When one contemplates the vast problems associated with the foregoing human-rights issues—the right to subsistence, the right to a family, and associational exclusivities—one is tempted to say that the more "Western" assertions of civil and political rights pale by comparison. Yet it is unfair to weigh sets of human rights. It is clear that Western support for human rights depends on regarding political and civil rights at least on a par with economic and social rights.

The right to subsistence is certainly "basic," yet that overworked term can also be applied to the right of habeas corpus. The need for governments to distribute food to starving people is "basic," but so is the free-speech right of people to criticize governments. In the Brecht-Weill musical drama *The Threepenny Opera* there is the line, "First feed the face, and then talk right and wrong." In one sense, though, we have to talk right and wrong before we can persuade anyone to feed the face.

It is amazing that, on the one hand, the more that governments tolerate criticism by their citizens, the more the citizens regard the governments as legitimate; and yet the more that governments allow free speech, the more governmental elites resent being criticized and do what they can (and the less democratic the regime, the more they can do) to suppress speech. This tension reflects a basic urge on the part of some governmental elites toward Caesarism—to experience power as a function of the arbitrariness and repressiveness of their rule. In this respect, freedom of speech is the most fundamental human right, because it acts as a check, through ridicule and exposure as well as debate, upon the tendency toward [pg177] governmental excess and runaway power accumulation. The inquiries into Watergate and Irangate were not diseases of the American system, but rather triumphs. The American people may have ended up trusting politicians less, but their trust of the political process must have increased. It takes a healthy political process to expose lawbreaking government officials.

The more free speech and self-criticism that takes place in some countries, the more likely it is to spread, through the media and, by example, to other countries. Scholars of international customary law should react to attempts by some governments to jam the airwaves and keep out unwelcome television signals; these practices, under the name of national sovereignty, are a direct affront to basic political and civil rights. The world in the twenty-first century—if we survive the threat of nuclear devastation—could either be a people-first democratic world or a government-first totalitarian world, and the tendency toward either extreme could easily tip one way or the other at any time. Our first notice that the scales are tipping in the wrong direction is when leaders call for the temporary abridgment of basic civil or political rights. They always have a popular cause at hand, and the passions of the moment are with them, but to go along with them could be an irreversible mistake.

In this respect, the more we are part of an *international* comprehensive system of civil and political rights, secured through multilateral conventions, the harder it will be for local officials to be able to abridge them. That is our payoff right here at home. Our payoff abroad, as I mentioned earlier in this essay, is that when freedom spreads to other lands, our nation becomes more secure in the things that we value most.

FOOTNOTES

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**Numbers in the format pg167, etc. refer to the pages in the original article.

FN1 See A. D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 149-64 (1987).

FN2 The Soviet Union is, today, the biggest bureaucracy in human history. One can better understand the nature of the Soviet government if one thinks in terms of bureaucracy—even in the abbreviated and simplistic terms given in the text above—than if one gets sidetracked by hundreds of volumes of Marxist-Leninist theory.

FN3 See Hannum & Lillich, *The Concept of Autonomy in International Law*, 74 AM. J. INT'L L. 858 (1980).

FN4 I. JENNINGS, *THE APPROACH TO SELF-GOVERNMENT* 55 (1956), *quoted in* Pomerance, *Self-Determination Today: The Metamorphosis of an Ideal*, 19 ISR. L. REV. 310, 311 (1984).

FN5 *Id.* at 337.

FN6 See, e.g., International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (Annex), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1967) (entered into force Jan. 3, 1976).

FN7 This is, in a sense, Rawls's theory of justice applied to the world as a whole instead of, as Rawls limited it, to a single country. I have offered elsewhere a critique of the Rawlsian position when it is thus extended, concluding that the extension points up some basic flaws in the theory itself even as applied to a single society. See A. D'AMATO, *JURISPRUDENCE: A DESCRIPTIVE AND NORMATIVE ANALYSIS OF LAW* 259-76 (1984).

FN8 Suppose there is a maximal percentage amount, X , for an ideal transfer payment. X then is the amount of tax when the payments are made abroad, with XI representing the tax on the income I . Within the country, the amount is $(X + k)I$. However, the additional amount, k , then gets funnelled back into the economy, increasing the income of those who are taxed, so that the effective tax is $(X + k)(I + kM)$, and thus if an appropriate increment to income, M , is chosen that reflects the purchasing power of the recipients of the transfer payments, the net effect is the same in the external and internal cases, i.e., $(X + k) I = (X + k)(I + kM)$.